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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 WELLS FARGO BANK, N.A.,

9 Plaintiff,

10 vs.

11 THE SKY VISTA HOMEOWNERS
12 ASSOCIATION and AIRMOTIVE
13 INVESTMENTS, LLC,

14 Defendants.

Case No. 3:15-CV-00390-RCJ

ORDER

15 Plaintiff and Defendant Airmotive bring competing claims for quiet title, arguing over
16 whether a nonjudicial foreclosure sale of the property initiated by Defendant Sky Vista
17 extinguished Plaintiff's deed of trust. Both currently seek summary judgment for these claims. The
18 Court finds that had Plaintiff offered tender to protect its interest in the property, Defendant Sky
19 Vista would have rejected it. The Court, therefore, grants summary judgment for Plaintiff.

20 **FACTUAL BACKGROUND**

21 In 2004, non-party Mr. Kehar Singh bought the property at issue located at 9658 Black
22 Bear Drive, Reno, NV 89506. (ECF No. 80 Ex. A.) To finance this purchase, Mr. Singh obtained
23 a deed of trust for \$68,373. Plaintiff ultimately became the beneficiary of the deed of trust in 2012.
24 (ECF No. 80 Ex. B.)

1 The property is part of a covenanted community serviced by Defendant Sky Vista as its
2 homeowner's association (HOA). Mr. Singh defaulted in his dues to Defendant Sky Vista, who
3 then hired two agents to initiate foreclosure proceedings: Kern & Associates, Ltd. (Kern) and Phil
4 Frink & Associates (Frink). Kern recorded the initial notice of delinquent assessment lien in June
5 2011, then Frink recorded a notice of default and election to sell in August 2011 and a notice of
6 foreclosure sale in April 2012. (ECF No. 80 Exs. D–F.) While none of these notices provided the
7 superpriority amount, the notice of delinquent assessment lien listed the total lien as \$1,088, plus
8 accruing quarterly assessments of \$63.00. (*See* ECF No. 80 Ex. D.)

9 On May 2, 2012, Plaintiff's predecessor-in-interest, Bank of America (BANA), emailed
10 Frink requesting details and instructions for tendering payment. (ECF No. 83 Ex. 1.) Frink relayed
11 this message to Kern, who then informed BANA it needed to pay the full lien amount of \$3509.28
12 to avoid the foreclosure sale as well as "subsequent assessment payments." (ECF No. 83 Ex. 2.)
13 Kern did not provide a breakdown of this figure nor the amount of the superpriority portion. Kern
14 further instructed BANA to deliver a check made payable to Defendant Sky Vista. (ECF No. 83
15 Ex. 2.) BANA again sent Frink a letter on May 15, 2012, claiming the superpriority amount was
16 still unclear and offering "to pay that sum upon presentation of adequate proof of the same by
17 [Defendant Sky Vista]." (ECF No. 80 Ex. G at Wells 00293.)

18 Defendant Sky Vista did not respond to the May 15 letter—rather, it proceeded with the
19 foreclosure sale. (ECF No. 80 Ex. G at Wells 00290.) In March 2013, it conducted the foreclosure
20 sale and sold the property for \$4,367.00 to TBD, LLC. (ECF No. 80 Ex. M.) TBD, LLC deeded
21 its interest in the property to TBR I, LLC in 2013, (ECF No. 80 Ex. O at Wells 00084–87), who
22 quitclaimed this interest to Defendant Airmotive in 2016. (ECF No. 80 Ex. P.)

23 During this time, BANA and Defendant Sky Vista engaged in routine correspondence
24 regarding this and a significant number of other similarly-situated properties. In several instances,

1 Kern, acting as an agent for Defendant Sky Vista and other HOAs, has rejected tender offers for
2 the correct superpriority amount conditioned upon a release of the junior lienholder's obligations.
3 (See ECF No. 80 Ex. H at ¶ 5 ("Kern made clear, on every occasion I dealt with Kern, that it would
4 not accept payment on the super priority unless and until the lender foreclosed and also paid costs
5 and fees related to the sale.").) These refusals have led to other litigation, and in depositions for
6 these cases, Ms. Gayle Kern testified that the office would reject any offer for payments with such
7 conditions. (See, e.g., ECF No. 80 Ex. L at 71:15–73:14.) Kern rejected such offers because of a
8 more expansive interpretation of the superpriority amount, which the Nevada Supreme Court later
9 rejected. (See, e.g., *id.* at 98:13–24.)

10 Plaintiff brings this case seeking quiet title and a declaration that its deed of trust survived
11 the nonjudicial foreclosure sale. Plaintiff further brings alternative claims for wrongful foreclosure
12 and violations of NRS 116.3116 against Defendant Sky Vista. Defendant Airmotive also seeks
13 quiet title against Plaintiff. Now, the parties have filed competing motions for summary judgment
14 over the quiet title claims. (ECF Nos. 79, 80.) While Plaintiff did not move for summary judgment
15 against Defendant Sky Vista, it responded to Plaintiff's motion, (ECF No. 83), and Defendant
16 Airmotive joined the arguments raised in that response, (ECF No. 86).

17 **LEGAL STANDARD**

18 A court should grant summary judgment where "the movant shows that there is no genuine
19 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
20 Civ. P. 56(a). A factual dispute is genuine when "the evidence is such that a reasonable jury could
21 return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
22 (1986). Only facts that affect the outcome are material. *Id.*

23 To determine whether summary judgment is appropriate, a court uses a burden-shifting
24 analysis. On the one hand, if the party seeking summary judgment would bear the burden of proof

1 at trial, that burden may be satisfied by presenting evidence that proves every element of the claim
2 such that no reasonable juror could find otherwise assuming the evidence went uncontested. *Id.*
3 at 252. On the other hand, when the party seeking summary judgment would not bear the burden
4 of proof at trial, it need only demonstrate that the other party failed to establish an essential element
5 of the claim or present evidence that negates such an element. *See Celotex Corp. v. Catrett*, 477
6 U.S. 317, 330 (1986) (Brennan J., concurring). A court should deny summary judgment if either
7 the moving party fails to meet its initial burden or, if after it meets that burden, the other party
8 establishes a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
9 574, 586–87 (1986).

10 **ANALYSIS**

11 Plaintiff shows that Kern had a standing policy to refuse any offer for the correct
12 superpriority amount conditioned upon a release of a subordinate lienholder's obligations.
13 Consequently, had Plaintiff offered tender of the correct superpriority amount, Defendant Sky
14 Vista would have rejected it. The Court therefore grants Plaintiff's motion and denies Defendant
15 Airmotive's because it finds that an offer of tender would have been futile.

16 NRS 116.3116(1) provides HOAs with a lien over a unit “for any construction penalty that
17 is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against
18 that unit or any fines imposed against the unit's owner from the time the construction penalty,
19 assessment or fine becomes due.” To the extent that the lien is comprised of “charges for
20 maintenance and nuisance abatement, and nine months of unpaid assessments,” it is known as the
21 “superpriority” lien and is senior to all other liens. *Bank of Am., N.A. v. SFR Investments Pool 1,*
22 *LLC (SFR II)*, 427 P.3d 113, 117 (Nev. 2018) (en banc) (citing NRS 116.3116(2)). Additionally,
23 NRS 116.31162 provides that an HOA may foreclose on an owner of a unit in default, and such
24 foreclosure may extinguish junior liens, including deeds of trust. *SFR Investments Pool 1 v. U.S.*

1 *Bank (SFR I)*, 334 P.3d 408, 416 (Nev. 2014) superseded by statute on other grounds as stated in
 2 *Saticoy Bay LLC 9050 W Warm Springs 2079 v. Nev. Ass'n Servs.*, 444 P.3d 428 (Nev. 2019).

3 Defendant Airmotive claims that there is a presumption in its favor as the current title
 4 holder, but regardless, the Nevada Supreme Court held that junior lienholders avoid
 5 extinguishment of their liens by providing valid tender to the superpriority lienholder. *SFR II*, 427
 6 P.3d at 117. Tender is an offer to pay in full coupled with present ability to do so—not “a promise
 7 to make a payment at a later date or once a certain condition has been satisfied.” *7510 Perla Del*
 8 *Mar Ave. Tr. v. Bank of Am., N.A.*, 458 P.3d 348, 350 (Nev. 2020) (en banc).¹ Tender offers,
 9 furthermore, must be unconditional, excepting those conditions the junior lienholder has a legal
 10 right to insist on. *SFR II*, 427 P.3d at 118.

11 Nevada law, however, does not require a junior lienholder to offer tender where it would
 12 be futile; that is, the evidence shows the superpriority lienholder would have refused the offer.
 13 *Perla*, 458 P.3d at 351–52. Thus, in the current context of nonjudicial foreclosure, a debtor that
 14 proves futility “preserve[s] its interest in the property such that [the buyer at foreclosure] purchased
 15 the property subject to [the debtor's] first deed of trust.” *Id.* at 352.²

16 While BANA's letter offering to pay the superpriority amount did not constitute tender, a
 17 formal tender offer would have been futile in this case—excusing this failure. Here, Kern sent
 18 BANA a letter instructing it to pay the full lien amount of \$3509.28 without providing an

19 ¹ The court issued *Perla* after briefing finished in this case. Subsequently, Plaintiff moved to file
 20 a supplemental brief arguing the opinion supports its futility argument, (ECF No. 91), and
 21 Defendants request the ability to respond if the Court grants the motion, (ECF Nos. 92, 93). But
 22 *Perla*, as relevant to this issue, merely affirms the generally-accepted proposition that “[o]ne is not
 23 obligated to do the useless and futile thing in complying with the formalities of a tender.” 74 Am.
 24 Jur. 2d *Tender* § 4 (2020). Therefore, *Perla* does not require the parties to modify their already-existing
 arguments on futility, and the Court denies the motion.

23 ² Plaintiff also relies on *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 435 P.3d 1217, 1220
 24 (Nev. 2019), which Defendants claim is not binding as the court reheard the case en banc but has
 not yet issued its opinion. (ECF No. 85 at 20:26.) This argument is moot because *Perla* stands for
 the same proposition.

1 accounting from which to calculate the superpriority amount with precision. (ECF No. 83 Ex. 2.)
2 These demands, in conjunction with Ms. Kern's deposition testimony in other cases, prove that
3 Kern had a standing policy of rejecting any payment of the correct superpriority amount
4 conditioned upon the release of the junior lienholder's obligation. (*See, e.g.*, ECF No. 80 Ex. L at
5 71:15–73:14.) In *SFR II*, the Nevada Supreme Court held that a junior deed of trust beneficiary
6 had a legal right to insist on such a condition (that is “acceptance of the tender would satisfy the
7 superiority portion of the lien”) under identical material facts. 427 P.3d at 118. Therefore, Plaintiff
8 has presented sufficient evidence for the Court to conclude that Kern would have refused a
9 proffered tender for the correct superpriority amount and containing appropriate conditions.

10 Defendant Sky Vista argues that the Court should exclude Kern's depositions and the
11 declaration of Mr. Rock Jung since Plaintiff did not disclose these items during discovery as
12 required by the Nevada Rules of Civil Procedure. (ECF No. 83 at 2:22–3:19.) However, federal
13 courts apply the Federal Rules of Civil Procedure, unless doing so would “exceed[] the
14 congressional mandate embodied in the Rules Enabling Act []or transgress[] constitutional
15 bounds.” *Hanna v. Plumer*, 380 U.S. 460, 463–64 (1965). As Defendant Sky Vista makes no
16 argument as to how the application of the Federal Rules would do either in this case, the Nevada
17 Rules of Civil Procedure are inapplicable. Additionally, besides Defendant Sky Vista's unsworn
18 allegation in its brief, it has not provided any evidence for the Court to consider whether Plaintiff
19 actually failed to adequately disclose. For these reasons, the Court will consider the exhibits.

20 Defendants further attack these exhibits as irrelevant because the testimony was in regard
21 to unrelated cases and properties. (ECF No. 83 at 3:12–3:15; ECF No. 85 at 20:4–12.) The Nevada
22 Supreme Court, however, ruled in *Perla* that a party can make its case for futility based solely on
23 the superpriority lienholder's business practice or habit of rejecting tender. 458 P.3d at 351.

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1 Defendant Airmotive also argues that, even if Plaintiff has proven that Kern would have
 2 rejected tender, it has not demonstrated that Frink would have also. This, Defendant Sky Vista
 3 argues, nullifies Plaintiff's futility argument because Plaintiff could have sent tender to Frink. Yet,
 4 of the two communications sent to Frink, one was responded to by Kern with instruction to send
 5 payment to it, (ECF No. 83 Ex. 2), and the other was ignored, (ECF No. 80 Ex. G at Wells 00290).
 6 Therefore, the only guidance to BANA from Defendant Sky Vista's agents was that it must send
 7 tender to Kern—not Frink. The Court, accordingly, finds that a formal tender offer would have
 8 had to have been sent to Kern, which would have been futile.

9 Defendant Airmotive claims that tender would not have been futile because Plaintiff could
 10 have paid Kern the entire lien amount and then requested a refund of the non-superpriority portion.
 11 (ECF No. 85 at 18–19.) The Nevada Supreme Court has stated that a junior lienholder may “pay[]
 12 the entire amount and request[] a refund of the balance.” *SFR I*, 334 P.3d at 418. Nevertheless, it
 13 did not hold that a junior lienholder *must* engage in such a costly endeavor to protect its rights. *Cf.*
 14 *SFR II*, 427 P.3d at 118 (“[The junior lienholder] had a legal right to insist” on the condition “that
 15 acceptance of the tender would satisfy the superiority portion of the lien, preserving [its] interest
 16 in the property.”) Here, Kern demanded \$3509.28 as well as future expenses, and without evidence
 17 of any nuisance abatement or maintenance costs, the total superpriority amount was the sum of
 18 nine months of assessments (or three quarterly assessments in this case)—totaling \$189.

19 Finding tender would have been futile and Defendants' arguments unpersuasive, the Court
 20 grants summary judgment on the claim of quiet title in favor of Plaintiff.³ Because the Court grants

21 ³ As the Court grants summary judgment on the ground of futility, it declines to address Plaintiff's
 22 alternative arguments based on equity and due process. Furthermore, Defendant Airmotive appears
 23 to argue that it and TBD, LLC were bona fide purchasers. (ECF No. 85 at 31–32.) This argument
 24 is inapposite because “[a] party's status as a [bona fide purchaser] is irrelevant when a defect in
 the foreclosure proceeding renders the sale void.” *SFR II*, 427 P.3d at 121. Although granting quiet
 title here does not render the entire foreclosure sale void, it does render the sale “void as to the
 superpriority portion.” *Id.*

1 summary judgment on this cause of action in favor of Plaintiff, it dismisses Plaintiff's alternative
2 claims against Defendant Sky Vista. (*See* ECF No 88 at 9:10–11 (“If [the Court grants Plaintiff’s
3 motion for partial summary judgment], it can dismiss [Plaintiff’s] alternative damages claims
4 against [Defendant] Sky Vista.”).) Lastly, the parties do not address Plaintiff’s “Fourth Cause of
5 Action” titled “Injunctive Relief,” so the Court does not either.

6 **CONCLUSION**

7 IT IS HEREBY ORDERED that Plaintiff’s Motion for Partial Summary Judgment (ECF
8 No. 80) is GRANTED.

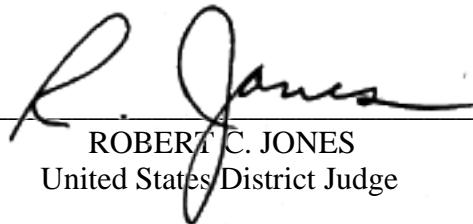
9 IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment (ECF No.
10 79) is DENIED.

11 IT IS FURTHER ORDERED that Plaintiff will SUBMIT a proposed judgment within
12 fourteen days of this Order.

13 IT IS FURTHER ORDERED that Plaintiff’s Motion for Leave to File Supplemental
14 Authority (ECF No. 91) is DENIED.

15 IT IS SO ORDERED.

16 Dated July 8, 2020.

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18 ROBERT C. JONES
19 United States District Judge
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